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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 755

HERMAN HOFFMAN AND NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION,

Appellants,

vs.

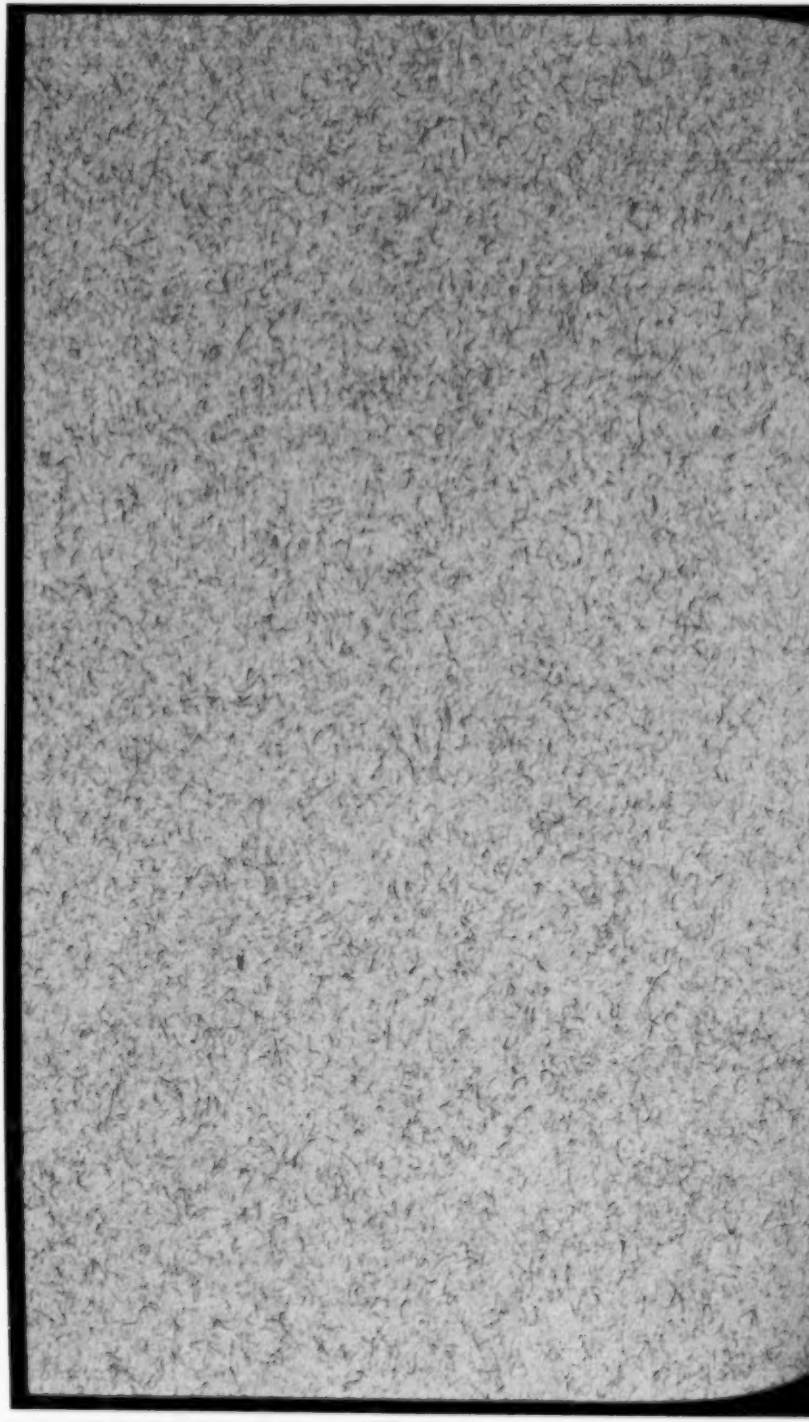
WILLIAM P. O'BRIEN, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK; FRANK HOGAN, AS DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND NATHANIEL L. GOLDSTEIN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION OF NATHANIEL L. GOLDSTEIN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, TO DISMISS OR AFFIRM.

NATHANIEL L. GOLDSTEIN,
Attorney General of New York,
Counsel for Appellee;
NATHANIEL L. GOLDSTEIN,
Attorney General of New York.

WENDELL P. BROWN,
Solicitor General;
SAMUEL A. HIRSHOWITZ,
Assistant Attorney General of New York,
Of Counsel.



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil No. 50-393

HERMAN HOFFMAN AND NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION,
Plaintiffs,

vs.

WILLIAM P. O'BRIEN, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, A MUNICIPAL CORPORATION; FRANK HOGAN, AS DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND NATHANIEL L. GOLDSTEIN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Defendants

STATEMENT OPPOSING JURISDICTION

Nathaniel L. Goldstein, Attorney General of the State of New York, one of the defendants above named, objects to the jurisdiction of the Supreme Court of the United States to entertain the appeal taken by plaintiffs upon the ground that the motion to dismiss the complaint resulting in the final order of dismissal was unnecessarily heard and determined by three judges instead of one, and is not appealable directly to the Supreme Court of the United States under Judicial Code, Section 266.

The above named defendant moved separately to dismiss the complaint on the ground that the District Court had no

jurisdiction over the subject matter of the case. Such motion was made before a single judge and came on for a hearing before Hon. Sylvester J. Ryan. The plaintiffs contended that the motion to dismiss should be heard by three judges. By an order dated October 19, 1949, Chief Judge Learned Hand of the United States Court of Appeals designated the Hon. Edward A. Conger and the Hon. Sylvester J. Ryan, judges of the United States District Court for the Southern District of New York and himself, the Chief Judge of the United States Court of Appeals for the Second Circuit to serve as members of a special statutory court under Section 2284 of the Judicial Code, and such special statutory court, after having been convened, heard and determined the motion and dismissed the complaint for lack of jurisdiction.

The defendant, the Attorney General of the State of New York, contends that the motion to dismiss for lack of jurisdiction should have been heard by a single judge, and that the convening of a special statutory court did not thereby give the plaintiff the right of direct appeal to the Supreme Court of the United States. The appeal herein should be to the United States Court of Appeals for the Second Circuit.

See:

Phillips v. *United States*, 312 U. S. 246, 250-251;
Stainback v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 381;
Ex parte Poresky, 290 U. S. 30, 31-32.

Dated, New York, N. Y., February 21, 1950.

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Defendant pro se.

WENDELL P. BROWN,
Solicitor General;
SAMUEL A. HIRSHOWITZ,
Assistant Attorney General,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 755

HERMAN HOFFMAN AND NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION,
Appellants,

vs.

WILLIAM P. O'BRIEN, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, A MUNICIPAL CORPORATION; FRANK HOGAN, AS DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND NATHANIEL L. GOLDSTEIN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now comes the appellee in the above entitled cause, Nathaniel L. Goldstein, Attorney General of the State of New York, and moves that the appeal be dismissed or that the judgment appealed from be affirmed.

The motion to dismiss or affirm is made upon the grounds that there is no properly presented substantial federal question and that the complaint does not allege facts which would warrant the granting of equitable relief by a federal

court to restrain enforcement of a state statute or a declaratory judgment declaring a state statute unconstitutional.

This appellee respectfully submits that the unanimous opinion rendered by the District Court, consisting of three Judges, in the instant case, does well indicate that there is no proper basis for the appeal herein.

The said opinion of the District Court is attached as Appendix "A" to appellants' "Jurisdictional Statements."

Dated, February 20, 1950.

NATHANIEL L. GOLDSTEIN,
Attorney General of the
State of New York,
Appellee pro se,
The Capitol, Albany, New York.

WENDELL P. BROWN,
Solicitor General;
SAMUEL A. HIRSHOWITZ,
Assistant Attorney General,
Of Counsel.

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BRIEF IN SUPPORT OF THE FOREGOING MOTION

Point I

The Complaint Is Devoid of Facts Showing That the Plaintiffs Have Been Deprived by the Appellees Acting under Color of the State Constitutional or Statutory Provisions of Any Constitutional Right or Any Rights Secured by Any Federal Law Providing for Equal Rights of Citizens or Other Persons.

The appellants in the "Jurisdictional Statements" rely upon Title 8, Section 43, U. S. C. A., R. S., Section 1979, as the basis for their complaint and upon Section 1343, subdivision 3, Title 28, U. S. C. A., formerly Section 41, subdivision 14(3), as the source of the jurisdiction of the District Court. It is clear, as the opinion of the District Court points out, that the appellants, however, fail completely in their complaint to present facts showing that they have been injured in a constitutional sense by the acts of the appellees acting under the procedure provided for in the state constitutional and statutory provisions sought to be challenged by appellants. Consequently, there is no properly presented substantial federal question.

United Public Workers v. *Mitchell*, 330 U. S. 75;
Alabama Federation of Labor v. *McAdory*, 325 U. S. 450;
National Maritime Union v. *Herzog*, 334 U. S. 854;
Douglas v. *City of Jeanette*, 319 U. S. 157;
Tileston v. *Ullman, State's Attorney*, 318 U. S. 44;
Fenner v. *Boykin*, 271 U. S. 240, 243;
McCabe v. *Atchison, Topeka & Sante Fe Ry. Co.*, 235 U. S. 151;
Williams v. *Miller*, 317 U. S. 599;
Missouri Pac. R. Co. v. *Norwood*, 283 U. S. 249, 255;

Snowden v. *Hughes*, 321 U. S. 1;
Watson v. *Buck*, 313 U. S. 387;
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89, 95-96.

POINT II

The Complaint Does Not Present Facts Which Would Warrant the Granting of Equitable Relief by a Federal Court to Restrain Enforcement of a State Statute.

Parker v. *County of Los Angeles*, 338 U. S. 327;
Rescue Army v. *Municipal Court*, 331 U. S. 549, 569;
Watson v. *Buck*, 313 U. S. 387, 400-401;
Beal v. *Missouri Pac. R. Co.*, 312 U. S. 45;
Douglas v. *City of Jeanette*, 319 U. S. 157;
Ramapo Water Co. v. *City of New York*, 236 U. S. 519;
Ex parte Poresky, 290 U. S. 30.

POINT III

The Complaint Does Not Present Facts Which Would Authorize the Granting of Declaratory Judgment (Title 28, U.S.C.A., Sections 2201-2202) Declaring the State Constitutional and Statutory Provisions as Violative of the Federal Constitution.

Rescue Army v. *Municipal Court*, 331 U. S. 549, 572;
Alabama Federation of Labor v. *McAdory*, 325 U. S. 450;
United Public Workers v. *Mitchell*, 330 U. S. 75;
Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local No. 123*, 321 U. S. 590;
Hague v. *C. I. O.*, 307 U. S. 496, 514.

Conclusion

The Motion to Dismiss or Affirm Should Be Granted.

Dated, February 20, 1950.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York.

WENDELL P. BROWN,
Solicitor General;
SAMUEL A. HIRSHOWITZ,
Assistant Attorney General,
Of Counsel.

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